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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 694

CARMINE PANICO and CARLIE DI PIETRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 412 F. 2d 1151. The opinion of the district court is reported at 291 F. Supp. 728.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to October 3, 1969, and the petition was filed on that

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion to vacate sentence was properly denied without a hearing.
2. Whether the trial judge should have disqualified himself from making such ruling.
3. Whether the conviction of petitioners should be vacated on the ground that the presumption provided by 21 U.S.C. 174 is unconstitutional.

STATEMENT

On July 10, 1962, after a trial by jury in the United States District Court for the Southern District of New York, petitioners and eleven co-defendants were convicted of narcotics offenses under 21 U.S. 173, 174. Carmine Panico was sentenced to imprisonment for twelve years and DiPietro to imprisonment for twenty years. The court of appeals affirmed, *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940. As appears from the opinion on direct review and the opinion of the district court in the present proceeding (Pet. App. 16-36),[1] during the trial there were numerous verbal outbursts and acts of violence by various defendants,

[1] Petitioners have filed several appendices to which we refer as follows: "Pet. App." designates the appendix to the petition for certiorari. "App. 1 to 86" consists of the motion to vacate sentence. "App. 1a to 283a" is the separately paginated addendum thereto, which is bound in the same volume.

including these petitioners [2] and Salvatore Panico, the brother of petitioner Carmine Panico. A major issue on appeal from the conviction (and on petition for a writ of certiorari) was whether the trial court acted properly in dealing with this misconduct and whether the disorder created by the various defendants, including Salvatore Panico, required a severance at least as to him.

On April 30, 1968, petitioners moved under 28 U.S.C. 2255 to vacate their sentences and asked that the trial judge disqualify himself on the ground that he was of necessity a material witness within the meaning of 28 U.S.C. 455 (App. 1-86). In their motion to vacate, petitioners alleged that they had been denied a fair trial by co-defendant Salvatore Panico's conduct and the trial court's rulings with respect to it. They asserted that new medical evidence showed that Salvatore's conduct was caused by uncontrollable psychological or emotional factors; that the direct review proceedings were decided upon an unconstitutionally inadequate record; and that the government had not correctly represented the facts to this Court (App. 2-6). The alleged "new" facts relate to (1) hospital records of Salvatore Panico and the handling of these facts by the government upon direct review, and (2) proffered testimony of

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[2] On one occasion, after the court had ordered the removal of Salvatore Panico from the courtroom, Carmine Panico called the judge a "lousy bum" and the judge and the prosecutor "dirty bastards" (App. 152a-154a). On another occasion, DiPietro persisted in threats to strangle Salvatore Panico and to "get him" outside the courtroom, despite the orders of the court that he be quiet (App. 179a, 182a).

Dr. Jay Katz, a psychiatrist, concerning the sanity of Salvatore Panico at the time of trial.

(1) With regard to the hospital records of Salvatore Panico, the files and records of the case show that following his conviction on July 10, 1962, he was returned to Sing Sing Prison, where he had been serving a sentence on a state charge (Pet. App. 54). On July 12, 1962, the psychiatrist of Sing Sing recommended that the prisoner be committed to Dannemora State Hospital, diagnosing the prisoner's condition as "Schizophrenia, paranoid type".[3] Pursuant to this recommendation, Salvatore was examined by two physicians, who stated that in their opinion he was insane and a proper subject for custody and treatment at this institution (App. 193a). A judge of the county court made the commitment (App.

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[3] The doctor gave as his reasons for this conclusion (App. 190a):

> The inmate has a history of recent suicidal attempts by hanging and inflicting lacerations on himself (multiple scars on both forearms). He is depressed, crying, despondent over the fact that "the fellows at the trial are out to get me here, too". He has not eaten because the food is poisoned, "they" put needles and bamboo sticks in his food. He is suspicious of everybody here, always in fear that "they" would harm him. While in the hospital at the Federal Detention House he saw a mark on the ceiling, he climbed up the wall to observe it closer and saw God's face. He, therefore, felt prote[c]ted. The fellows came twice to get him but he defended himself by throwing chairs at them. He is likely to injure himself if precautionary measures are not taken.

For discussion of the "recent suicidal attempts" and chair throwing, see *United States* v. *Bentvena*, *supra*, 319 F. 2d at 930.

196a-197a). This diagnosis and commitment was communicated to the court of appeals by petitioners' present counsel on the appeal by Salvatore Panico of his conviction for contempt of court. *United States* v. *Panico*, 308 F. 2d 125, 129 (C.A. 2), reversed 375 U.S. 29.[4]

On petitions for certiorari to review the 1962 narcotics convictions, both Carmine Panico, represented by his present counsel (Pet. of Carmine Panico, No. 359, O.T., 1963, p. 17), and co-defendant Mirra (Pet. of Anthony Mirra, No. 705 Misc., O.T., 1963, p. 26) referred to this diagnosis and commitment. In reply to the latter, the government stated in its Memorandum in Opposition, p. 3:

> Petitioner makes much of the fact that, after his conviction, [Salvatore] Panico was committed to a hospital for insane persons in New York (Pet. 26). This is not the place to resolve the question of Panico's sanity. However, in light of the references, by this petitioner and others, to the New York commitment, we think it appropriate to advise the Court that the diagnosis of schizophrenia was tentative; that, on fuller examination, the New York authorities have concluded that schizophrenia was not a correct diagnosis; and that Panico was, on September 17, 1963, found suitable for return to prison.

To this was appended a footnote, reading as follows:

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[4] In reversing the conviction of Salvatore for contempt this Court noted the diagnosis of schizophrenia and the commitment to a state mental hospital. *Panico* v. *United States*, 375 U.S. 29, 30.

> In view of continued treatment of Panico's transfer as a conclusive finding of his insanity, we are lodging with the Court the following: (1) Proceedings in the matter of the commitment to Dannemora State Hospital of Salvatore Panico, # 129-446, an alleged insane prisoner; and (2) Dannemora State Hospital Clinical Summary of Salvatore Panico.

The substance of the documents which the government lodged with the Court was that Salvatore Panico was admitted to Dannemora Hospital on August 22, 1962, from Sing Sing, where he was serving a sentence for burglary. His family and personal history were negative for mental or nervous disorders (Pet. App. 54-57). The onset of mental illness and recent suicidal attempts were described in the language used by the psychiatrist at Sing Sing, set forth *supra* at page 4, n. 3. Because of the suicidal attempts, the patient was placed in a restraint sheet. During an interview, he said that there was poison in his food, that the fellows were after him; and that he did not know whether he saw God's face or not. Because of his uncooperative attitude, the examination was discontinued (Pet. App. 57). The patient was placed on tranquilizers. He showed progressive improvement and became very anxious to return to the prison (Pet. App. 58). On September 17, 1963, his condition and the recommendation of the hospital were stated as follows (Pet. App. 60-61):

> He has responded to medication and this was discontinued on July 5, 1963. He is in good contact, he shows no evidence of any symptoms

suggesting Schizophrenia which was the original impression. Today at Staff his ward physician as well as the Staff and psychologists, whom he had in group therapy and recently gave psychological test, which failed to reveal any evidence of Schizophrenia, expressed the idea that the patient has Psychopathic Personality and has not seen any evidence of Schizophrenia. Accordingly, the patient's diagnosis is changed from Schizophrenia, Paranoid to Psychosis with Psychopathic Personality, Depressed Episode. The patient has recovered and is found suitable for return to prison.

DIAGNOSIS: PSYCHOSIS WITH PSYCHOPATHIC PERSONALITY, DEPRESSED EPISODE

CONDITION: RECOVERED FROM PSYCHOSIS

RECOMMENDATION: RETURN TO GREEN HAVEN PRISON

No response was made to the government's memorandum or to the medical records thus lodged with the Court on November 21, 1963. On December 9, 1963, all petitions for certiorari in the case were denied (375 U.S. 940).

On May 5, 1965, Mr. Harris B. Steinberg, attorney for DiPietro on his appeal and petition for certiorari, wrote the Solicitor General that Mr. Abraham Glasser had communicated information indicating the possibility that the Court had been misled in its appraisal of the sanity of Salvatore Panico by statements in the government's brief and because of the illegibility of certain photocopies (Pet. App. 77-80). On May 11, 1965, Mr. Glasser also wrote to the So-

licitor General, offering his cooperation, as the person who had "dug up" this information (Pet. App. 80-81). The Solicitor General answered both communications promptly. He stated that the question of Salvatore Panico's mental condition at Dannemora, if relevant at all, was at best peripheral in these cases.[5] The government summary, he said, seemed to have been correct. The clinical summary lodged with the Clerk was readily legible. A Xerox copy of the document itself was enclosed for counsel's examination (Pet. App. 83-84). No further correspondence ensued and no action was taken for a period of almost three years, when the present motion was filed.

(2) Petitioner also submitted, in connection with their present motion, the affidavit of Dr. Jay Katz. After stating an impressive professional background, the affiant recounted the documents made available to him—extensive portions of the trial transcript, briefs of counsel, all of the papers in the certiorari proceeding following Salvatore Panico's contempt conviction, the Dannemora State Hospital proceedings, and correspondence. Dr. Katz had held several conferences with Mr. Glasser. Following interviews, psychological examinations and tests of Salvatore Panico conducted by him and his assistant, Dr. Prelinger, he was of opinion that Panico was not malingering during the 1962 trial. Panico's behavior

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[5] Salvatore Panico was not a petitioner, his conviction having been reversed and the cause as to him remanded by the court of appeals. *United States* v. *Bentvena*, *supra*, 319 F. 2d at 942-944.

"was at least akin to that of psychotic persons with paranoid tendencies and with marked potential towards aggressive action engendered by convictions and fright of unjust persecution so profound and overmastering as to throw him helplessly into episodes of senseless and violent behaviour beyond his control". Panico "felt that he was falsely accused of a narcotics conspiracy and as the trial progressed he became convinced that he was framed not only by the witnesses who testified against him but also by the Government and Judge." While neither Dr. Katz nor Dr. Prelinger found any current evidence of a schizophrenic disorder, they would instead describe Salvatore's condition as a severe character disorder and would liken some of his behavior in the courtroom to that of psychotic persons. Since the physicians at Dannemora had diagnosed his case as "psychosis with psychopathic personality, depressed episode", he would like "to review the clinical records of the hospital in order to determine whether at that time he [Panico] might have been so regressed as to actually have been in a psychotic state." In his opinion, there was "a serious question of Mr. Panico's own competence to stand trial at the operative times in 1962, particularly in view of his paranoid inability (or paranoid unwillingness) to cooperate with his own trial counsel" (Pet. App. 85-94).

The trial judge denied the motion to vacate without a hearing. In so doing, the court said (Pet. App. 36):

> Cutting through the clutter of distortions, half-truths, opinions, conclusions and sophistical ar-

> guments presented in petitioners' voluminous papers, the material question on this application is not whether Salvatore was sane or insane during trial but whether his conduct deprived petitioners of a fair trial. The focus of this inquiry is, thus, not on the cause of Salvatore's misconduct, but on its effect upon petitioners' rights. * * *

The court found that the supporting papers on the motion to vacate failed to present new evidence, inasmuch as the medical records submitted had already been considered and the proffered testimony of Dr. Katz was merely cumulative of evidence received during the trial (Pet. App. 41-50). The basic issue —which was whether petitioners had received a fair trial—had already been decided on direct review (Pet. App. 37-41, 49-50). Judge McMahon also denied the motion that he disqualify himself, noting that one of the principal reasons for enacting Section 2255 was to enable the sentencing judge to pass upon the contentions, on the basis of his personal knowledge gained through trial of the case (Pet. App. 50-51). In affirming, the court of appeals used similar reasoning (Pet. App. 1-12).

ARGUMENT

1. As both courts below found, the present motion is merely an attempt to reargue an issue long since resolved against petitioners. The files and records of the case show that their proffered "new" evidence has neither significance nor novelty. On direct appeal from the conviction, the court of appeals gave

minute attention to the various acts of disrespect and violence by the different defendants, including Salvatore Panico, and the steps taken by the court to admonish the jury to disregard them and to determine guilt or innocence of each defendant solely on the basis of the evidence relating thereto. Its conclusion was that petitioners received a fair trial and that the evidence supported their conviction. *United States* v. *Bentvena*, 319 F. 2d 916, 926-933, 944 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940. The fairness of the trial of petitioners does not depend upon whether Salvatore's insanity was real or feigned, or whether he was competent or incompetent to stand trial. The question is whether his acts, however prompted, deprived them of a fair trial. In the absence of exceptional circumstances, not here presented, the determination that petitioners received a fair trial is not subject to reconsideration on collateral attack. See, *e.g.*, *Dranow* v. *United States*, 407 F. 2d 47 (C.A. 8); *Jackson* v. *United States*, 394 F. 2d 114 (C.A. 5); *Baca* v. *United States*, 383 F. 2d 154 (C.A. 10), certiorari denied, 390 U.S. 929; *Genovese* v. *United States*, 378 F. 2d 748 (C.A. 2).

The charges of bad faith on the part of the government (Pet. 35-38, 43, 48) are unsupported by the facts. The medical records of Salvatore Panico (Pet. App. 54-76) were lodged with the Court. The exact nature of the final diagnosis at Dannemora, which seems to be the crux of petitioners' complaint, appeared in large capital letters which could not con-

ceivably have been misread.[6] Even assuming that counsel were unaware of the nature of the final proceedings at Dannemora, despite the fact that the government had lodged a copy with the Court and had briefly but accurately stated its substance, counsel admittedly knew of them in the spring of 1965, but took no action until three years later.

The claim that the courts below misapprehended the nature of the Dannemora Clinical Summary (Pet. 39, 41) is also without foundation. The district court noted the full language of the diagnosis (Pet. App. 48, n. 47). The fact that it, as well as the court of appeals, at other points followed the equally appropriate language of the Summary, using the adjective "psychopathic" (Pet. App. 8, 42, 47), is of no significance.

The affidavit of Dr. Katz is, as the courts below have pointed out, merely cumulative, and weaker than the testimony given on behalf of Salvatore Panico at trial (see App. 85a-94a). The doctor's opinion that this defendant was not malingering, that he believed that he was being "framed", that he may have been incompetent to stand trial, that examination of his daily records might further assist the doctor in estimating his condition (*supra*, p. 9), even if true, lacks significance at this time. The question was the fairness of petitioners' trial, not

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[6] The copies lodged with the Court at that time are somewhat smudged, but can easily be read. Since these were only lodged with the Court, they were returned to the Department upon final disposition of these cases and by us returned to the United States Attorney. When the nature of these copies was subsequently brought into question in 1965, they were returned to the Department file at our request.

the mental condition of Salvatore Panico. That issue received close examination at trial and on direct review.

2. In view of the failure to present allegations which would require a hearing, it is academic to speculate whether Judge McMahon would "of necessity" have been a witness if a hearing had been held. One of the purposes of enacting Section 2255 was to permit the trial judge to pass upon the questions raised because of his familiarity with the proceedings. *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916; *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022. Especially in view of petitioners' failure at any time to show what they expected the judge's testimony to prove, there was no error in his refusal to disqualify himself. *United States* v. *Hughes*, 325 F. 2d 789, 792-793 (C.A. 2), certiorari denied, 377 U.S. 907. Petitioners specifically deny any contention that he was prejudiced (App. 10, fn.).

3. Petitioners raise here for the first time, but do not argue, the validity of the presumption of 21 U.S.C. 174 (Pet. 10, 50). That question is presently before the Court in *Turner* v. *United States*, No. 190, O.T., 1969. However, *Turner* is on *direct appeal;* in our view, there is no reason to defer ruling on the present claim, since the issue here is raised in a post-conviction proceeding under 28 U.S.C. 2255. As this Court pointed out in *Kaufman* v. *United States*, 394 U.S. 217, 229: "The availability of post-conviction relief serves significantly to secure the integrity of

proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively." At the time of trial and appeal in this case the validity of the Section 174 inferences had been repeatedly upheld by the lower courts under the authority of *Yee Hem* v. *United States*, 268 U.S. 178. Even were this Court to find the inferences invalid in *Turner*, the reliance on prior settled law and the burden of retroactive application on the administration of justice would militate against affording relief under 28 U.S.C. 2255. See, *e.g.*, *Desist* v. *United States*, 394 U.S. 244; *Stovall* v. *Denno*, 388 U.S. 293, 297.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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